

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

with affidavit

77-4144

To be argued by
RICHARD J. LEON

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P/S

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-4144

MAU KWAI CHENG,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR THE RESPONDENT

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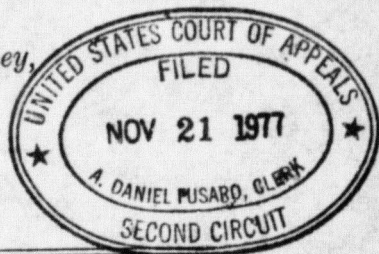


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BOARD OF IMMIGRATION APPEALS

BRIEF FOR THE RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a, Mau Kwai Cheng ("Cheng") petitions this Court for review of: (1) the decision of the Board of Immigration Appeals (the "Board") on September 10, 1973 denying Cheng's application for the extraordinary discretionary relief of suspension of deportation under Section 244(a) of the Act, 8 U.S.C. §1254 (a);¹ and, (2) the decision of the Board

¹ On December 26, 1973 Cheng filed a petition for a review in this Court under Section 106 of the Act, U.S.C. § 1105a seeking review of the Board's decision on September 10, 1973. On February 26, 1976 a stipulation of dismissal between Cheng's counsel and the counsel for the Immigration and Naturalization Service (the

[Footnote continued on following page]

on June 28, 1977, refusing to reopen and reconsider its previous denial on September 10, 1973. Cheng contends that both of the Board's decisions should be reversed because they constitute an abuse of discretion.

Issues Presented

Whether the Board of Immigration Appeals abused its discretion by denying petitioner's application for suspension of deportation in its decision on September 10, 1973.

Whether the Board of Immigration Appeals abused its discretion by refusing to reopen the petitioner's deportation proceedings in its decision on June 28, 1977.

Statement of Facts

Petitioner Cheng is a 52 year-old native and citizen of China (AR 102).² On March 29, 1964, Cheng entered the United States at Baltimore, Maryland as a non-immigrant crewman on the ship "GOEREE" (AR 89). He was authorized to remain in the United States a maximum of 29 days (AR 101).³ At the expiration of his authorized stay Cheng failed to depart or obtain any extension of his authorized stay in this country (AR 101).

"Service") was so ordered by this Court. The stipulation provided that the petition for review be withdrawn without prejudice in order that Cheng could file with the Board a motion to reopen and reconsider its decision on September 10, 1973 based on the fact that his son had become a lawful permanent resident of the United States subsequent to that decision. In addition, the stipulation provided that should Cheng seek judicial review of an adverse decision by the Board on his motion to reopen, he would also be permitted to challenge the Board's September 10, 1973 decision.

² References in this brief preceded by the letters "AR" are to the certified administrative record previously filed with this Court.

³ Section 252(a) of the Act, 8 U.S.C. § 1282(a).

Instead he went to New York City where he illegally obtained a job⁴ and living accommodations.

On June 3, 1964 Cheng surrendered himself to the Service (AR 106). Upon reporting to the Service's New York City office a warrant for his arrest (AR 100) and an order to show cause and notice of hearing were executed by the Service (AR 101). The order to show cause, which was personally served on Cheng, charged him with remaining in the United States without authority in violation of Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) (AR 101). The order also notified him to appear for his deportation hearing seven days later, June 10, 1964 (*Id.*).

On June 10, 1964 Cheng appeared before Immigration Judge Henry Millman at the Service's New York City office for his deportation hearing. Cheng, with the assistance of counsel, admitted his deportability under the charges presented against him in the order show cause, and thereafter applied for the only discretionary relief available to him, voluntary departure (AR 96).⁵ Since Cheng represented a willingness and ability to depart from the United States voluntarily, Judge Millman entered an

⁴ As a non-immigrant alien crewman, Section 101(a)(15)(D) of the Act, 8 U.S.C. § 1101(a)(15)(D), Cheng was not authorized to obtain employment without the express approval of the Service. 8 C.F.R. § 214.1(c). By violating this restriction in the terms of his entry, Cheng was subject to deportation on this ground as well, Section 241(a)(9) of the Act, 8 U.S.C. § 1251(a)(9).

⁵ See Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 C.F.R. § 244. This relief can be granted where the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted it removes the stigma of an order of deportation from the alien's record and facilitates any future lawful entry into the country he might wish to make. See Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17); *Ballenilla-Gonzalez v. I.N.S.*, 546 F.2d 515, 521 (2d Cir. 1976).

order granting him 30 days in which to depart voluntarily and issued an alternative order of deportation to Hong Kong in the event that Cheng failed to depart within the time allotted (AR 93). Three weeks later, however, the Service notified Cheng that his voluntary departure was not required at that time and that he would be notified later when he would be expected to depart (AR 92).

On June 7, 1965 the Service notified Cheng that he would have to depart voluntarily on or before July 6, 1965 (AR 91). Cheng requested an extension of this period and the Service agreed on June 15, 1965 to extend it to October 6, 1965 (AR 90). Cheng failed to depart and a warrant of deportation was subsequently issued by the Service on October 11, 1966 (AR 89).

On November 28, 1966, Cheng, through his counsel, requested a stay of his deportation in order that he might apply to adjust his status under Section 245 of the Act, 8 U.S.C. § 1255 from a non-immigrant crewman to a conditional entrant under Section 203(a)(7) of the Act, 8 U.S.C. § 1153(a)(7) (AR 8). Pending a determination of this application, the Service, on December 19, 1966, pursuant to Section 242(d) of the Act, 8 U.S.C. § 1252 (d), issued an order of supervision (AR 107-108) which permitted Cheng to temporarily remain at large upon the following terms:

- "(1) That [Cheng] shall produce himself, at time and place designated for deportation pursuant to the order of deportation.
- (2) That [Cheng] shall upon request produce himself, at time and place designated, for the purpose of submitting to medical and psychiatric examination and/or to furnish such information relating to this availability for deportation as may be deemed fit and proper.

- (3) That [Cheng] shall not travel outside the NEW YORK DISTRICT for a period in excess of 48 hours without first having notified the DEPORTATION BRANCH at the [Service's New York District Office].
- (4) That [Cheng] shall furnish written notice to the DEPORTATION BRANCH of the [Service's New York District Office] of any change of residence or employment within 48 hours after change is made.
- (5) That [Cheng] report in person the 1st day of June of each year, or the next business day thereafter, to the DEPORTATION BRANCH of the Service's [the New York District Office]". (emphasis added)

Cheng was personally served with a copy of this order of supervision and it was *read* and *explained* to him by an interpreter in his native language [Chinese] (AR 108). In addition, he certified that he understood the contents of the order and that a failure to comply with the conditions would subject him to prosecution (*Id.*).

On November 7, 1967 the Service lifted its order of supervision and forwarded a notice to Cheng, at his last reported address,⁶ directing him to report to the Service's

⁶ Throughout the record there are considerable inconsistencies between Cheng's address on file with the Service and where he actually lived. For example when the order of supervision was entered on November 7, 1967 Cheng stated his address as 410 East 13th Street, New York, New York (AR 108). Actually, however, he was living at that time in Philadelphia at the restaurant where he was working (AR 112, 118) and he was using a mail box at 424 East 13th Street, New York, New York as a mail drop and home address (AR 118). Moreover, when Cheng filed his application for suspension of deportation in August, 1971 he did not even list his former address at 410 East 13th Street on the

[Footnote continued on following page]

New York City office for deportation to Hong Kong on November 16, 1967 (AR 116). This notice, of which copies were sent to petitioner's attorney (*Id.*), was returned to the Service by the Postal Service as unclaimed (AR 37). When Cheng failed to appear on November 16, 1967 the Service began an investigation to determine his whereabouts (AR 66).

In April 1971, at a time when he had been in the United States for more than seven years, Cheng was finally located and apprehended by Service investigators (AR 63). On April 22, 1971 he moved to reopen his deportation proceedings in order that he might apply for the extraordinary discretionary relief of suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254(a) (AR 74-77).⁷ Immigration Judge Millman the next day ordered that the proceedings be reopened in order for Cheng's application to be submitted and considered (AR 73).

On August 3, 1971 a hearing was conducted by Judge Millman to review Cheng's application (AR 102-105) and determine whether he should be granted this extraordinary remedy (AR 54-72). At the hearing, Cheng, with the assistance of counsel (AR 55), attempted to demon-

application (AR 102). In sum, Cheng has continually failed to keep the Service advised of his current address in violation of the order of supervision.

⁷Section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1) provides that the Attorney General, through the Service, may suspend the deportation of an alien who, *inter alia*, has been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of [his] application, . . . and is a person whose deportation would . . . result in extreme hardship to the alien or to his spouse, parent or child, who is a citizen of the United States or lawfully admitted resident alien . . . To be eligible for this relief, an alien has the burden of proving compliance with these provisions. *Rassano v. Immigration and Naturalization Service*, 492 F.2d 220 (7th Cir. 1974); *Ex parte Orlando*, 131 F. Supp. 485 (S.D.N.Y.), *aff'd*, 222 F.2d 537 (2d Cir.), *cert. denied*, 350 U.S. 862 (1954).

strate his eligibility by claiming that his deportation would constitute an extreme hardship to himself personally because he feared that he would be unable to obtain employment upon returning to Hong Kong (AR 61).

In the course of Cheng's examination it was revealed that he had not only failed to report annually to the Service as required by the order of supervision, but had held jobs in Philadelphia and New Jersey during the previous four years and had not informed the Service's Deportation Branch of these jobs and the different addresses at which he had lived while working there. Despite this information, Judge Millman, decided to reserve judgment on Cheng's application and asked for additional information regarding his tax returns and the Service's investigation on Cheng which had not been completed (AR 70-71).

On September 8, 1972 the Service's investigation unit completed its investigation (AR 117-120). On November 28, 1972, Judge Millman reopened Cheng's hearing to receive this additional information (AR 35-54). At the hearing Cheng was again represented by counsel (AR 39). The Service's trial attorney proceeded initially by examining Cheng about where he had worked and lived since he came to the United States (AR 40-46). A review of this examination indicates that the trial attorney's questions raised doubts about Cheng's whereabouts during the preceeding four years. It became apparent that Cheng had spent the preceeding four years carefully evading the Service by working and living in two other states and relying on the order of supervision to protect him against arrest. By the time the agents from the Service's New York office apprehended him in April of 1971, he had accrued the minimum of seven years of physical presence in this country to apply for suspension of his deportation.

When the Service's trial attorney completed questioning him, Cheng's counsel introduced new evidence in support of his suspension application by informing the Court that since the last hearing in August, 1971 (14 months previously) he had invested \$7,500 of his own money into a restaurant, despite an outstanding order of deportation, and that as a result his deportation at this time would be even a greater economic hardship on himself than before (AR 47-50). After receiving this testimony with its inherent inconsistencies,⁸ Judge Millman reserved judgment, afforded counsel an opportunity to submit additional evidence and adjourned the hearing (AR 52).

On February 12, 1973 Judge Millman issued a written decision finding that Cheng had failed to demonstrate his eligibility for suspension of deportation because there was nothing in the record to demonstrate that his deportation would result in extreme hardship to himself (AR 31). Moreover, Judge Millman concluded that even if Cheng had established his eligibility for this relief, that as a matter of discretion alone, the evasive conduct of Cheng during the preceding years designed to circumvent the Service in order to obtain the seven year mini-

⁸ When Cheng applied to Judge Millman in August 1971 for suspension of deportation he claimed in his sworn application that his total assets were \$3,000 (\$2,000 in cash and bonds and \$1,000 in miscellaneous personal property) (AR 104). At the hearing on November 28, 1972, only fourteen months later, Cheng testified under oath that his only income during that 14 month period was what he earned while working for three to four months at a restaurant for \$120 per week (AR 50). Combining this information Judge Millman asked Cheng where he got the \$7,500 to invest in a restaurant (*Id.*). Understandably, Cheng was unable to account for the large increase in assets and tried to explain that his application was erroneous and that he was afraid to make any corrections. Surely, this answer was not convincing to Judge Millman and undoubtedly further weakened Cheng's credibility.

mum physical presence requirement would not warrant the granting of this extraordinary relief (AR 32). However, in light of the equities present, Judge Millman did decide to accord Cheng the only other relief available and therefore ordered that he be permitted to depart voluntarily within such time as the District Director would permit (AR 33).

On February 20, 1973 Cheng appealed Judge Millman's decision to the Board (AR 27). After hearing oral arguments on May 1, 1973 (AR 17-25) and receiving briefs, the Board issued a written decision on September 10, 1973 upholding Judge Millman's decision by finding that Cheng had failed to satisfy the "extreme hardship" requirement of Section 244(a) and that as a matter of discretion he did not merit suspension of deportation (AR 15-16). Consequently on September 20, 1973 the Service notified Cheng to voluntarily depart from the United States by October 20, 1973 (AR 12). Cheng did not comply with this order.⁹

On March 5, 1976 Cheng presented the Service with a motion to reopen his deportation proceedings in order that his application for suspension of deportation be reconsidered in light of the fact that his son had entered the United States from Hong Kong and was now a lawful permanent resident of the United States who would suffer extreme hardship if his father were deported (AR 8-11). The Service's District Director agreed to stay Cheng's deportation in order that the Board could pass on this motion (AR 7). The Service meanwhile opposed the motion contending that the presence of Cheng's son in the United States as a lawful permanent resident still did not satisfy the "extreme hardship" requirement of Section 244(a).

The Board, on June 28, 1977, issued a decision denying Cheng's motion to reopen and reconsider. (AR 2-4).

⁹ See note 1 *supra*.

In its opinion the Board found that Cheng had failed to demonstrate that his deportation at this time would result in extreme hardship to either himself or his son (*Id.*). On July 12, 1977 the Service issued a warrant for Cheng's deportation (AR 1). Three weeks later, August 4, 1977, Cheng filed a petition for review in this Court seeking to set aside the Board's decision refusing to reopen its proceedings. Consequently, Cheng has remained in the United States pursuant to the automatic statutory stay of deportation which accompanies every petition for review filed pursuant to Section 103(a)(3) of the Act, 8 U.S.C. § 1103(a)(3).

Relevant Statute

Immigration and Nationality Act, 63 Stat. 1163 (1952) as amended:

Section 244, 8 U.S.C. § 1254—

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

Relevant Regulations

Title 8, Code of Federal Regulations (C.F.R.):

§ 3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportations proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. . . .

§ 3.8 Motion to reopen or motion to reconsider.

(a) Form. Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent

§ 242.22 Reopening or reconsideration.

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of § 103.5 of this chapter. The special inquiry officer may upon his own mo-

tion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he had made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this chapter. An order by the special inquiry officer granting a motion to reopen may be made on Form I-328. A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing. . . .

ARGUMENT

POINT I

The Board Of Immigration Appeals Did Not Abuse Its Discretionary Authority By Declining To Grant Petitioner's Request For Suspension Of Deportation In Its Opinion On September 10, 1973.

A. Suspension of Deportation

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. § 1254(a), is the ultimate form of relief available to a deportable alien. It is extraordinary in nature and is granted as a matter of discretion. An alien whose application is approved has his deportation cancelled and obtains status adjustment to that of a permanent resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General

must be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. § 1254(c); *McGrath v. Kristensen*, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements contained in the statute. He must establish that he has been physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.

The applicant for suspension of deportation has the burden of showing that he meets these prescribed conditions. 8 C.F.R. 242.17(d); *Kimm v. Rosenberg*, 363 U.S. 405 (1960), *rehearing denied*, 364 U.S. 854; *Brownell v. Cohen*, 250 F.2d 770 (D.C. Cir. 1957). If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable exercise of discretion. *Hintopoulos v. Shaughnessy*, *supra*; *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Ng v. Pilliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961).

B. The Board properly concluded that Cheng was statutorily ineligible for suspension of deportation under Section 244(a) of the Act.

Cheng attempted to satisfy the eligibility requirement of extreme hardship by claiming that he would personally suffer an economic hardship if he were to return to Hong Kong because: (1) he might not be able to get a job there due to the country's economic situation; and (2) he would have to liquidate his investment in the restaurant he allegedly purchased in 1972 (AR 48). Both Immigration Judge Millman and the Board on appeal concluded that this claim of economic hardship did not constitute the type of extreme hardship contemplated by Section 244(a) of the Act, 8 U.S.C. § 1254(a). As the case law demonstrates, the mere showing of an economic hardship is insufficient to warrant the discretionary relief of suspension of deportation. See *Pelaez v. Immigration and Naturalization Service*, 513 F.2d 303 (5th Cir. 1975); *Nishikage v. Immigration and Naturalization Service*, 443 F.2d 904 (9th Cir. 1971); *Cheung v. Immigration and Naturalization Service*, 422 F.2d 43, 46-47 (3d Cir. 1970). In fact, petitioner's counsel advanced virtually the exact same arguments in the *Cheung* case¹⁰ and the Third Circuit dismissed them and upheld the Board's finding of non-eligibility. *Cheung v. Immigration and Naturalization Service*, *supra*.

¹⁰ Compare the arguments regarding water shortages, employability and communist infiltration made at pages eight and nine of petitioner's brief with the arguments raised in the *Cheung* appeal. *Cheung v. Immigration and Naturalization Service*, *supra*, at 45-46.

C. The Board properly denied Cheng's application for suspension of deportation as a matter of discretion

Immigration Judge Millman held that even if Cheng had established his eligibility for this relief, he would deny his application for suspension of deportation as a matter of discretion (AR 31). The Board upheld this decision by Judge Millman concluding that his decision was a proper exercise of discretion (AR 15-16). The basis for this decision by Judge Millman, and the Board, was the "manner in which [Cheng] prolonged his stay in the United States and acquired the necessary period of residence for suspension of deportation" (AR 32). Cheng now asserts that this decision by the Board was an abuse of discretion.

In reviewing this exercise of discretionary authority the scope of judicial review is extremely narrow. This Court is precluded from substituting its judgment for that of the Board unless the Board's determination is found to be without any rational explanation, to depart inexplicably from established practices, or to rest on an impermissible basis. *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Ex Parte Orlando*, 131 F. Supp. 485 (S.D.N.Y.), *aff'd*, 222 F.2d 537 (2d Cir.), *cert. denied*, 350 U.S. 862 (1954). A brief review of the record, in light of this limited standard of review, demonstrates the propriety of the Board's discretionary decision.

When Cheng was temporarily released from the Service's custody under an order of supervision on December 19, 1966, he agreed that he would: (1) report to the Service for deportation when so directed; (2) refrain from traveling outside the New York District for more than 48 hours without notifying the Service; (3) furnish written notice to the Service within 48 hours of any change

of address or employment; and (4) report annually to the Service at a specified date (AR 107-08). The record indicates that Cheng completely disregarded each of these conditions. Not only did he fail to report for his deportation on November 16, 1967 (AR 116), but he worked and lived at various places in Philadelphia and New Jersey (AR 64, 112, 118) before and after his deportation date without ever notifying the Service. In addition, he continued to use the order of supervision to avoid apprehension by immigration officers even though it was no longer in effect (AR 40). Finally, Cheng failed to annually report to the Service as prescribed by the order (AR 68). In sum, Cheng's conduct between November, 1966 and his apprehension in April, 1971 evidenced a purposeful and conscious pattern of evasive conduct which certainly did not merit the extraordinary discretionary relief or suspension of deportation. Accordingly, the Board's decision should be affirmed by this Court.

POINT II

The Board Of Immigration Appeals Did Not Abuse Its Discretionary Authority By Refusing To Reopen Cheng's Deportation Proceedings.

A. The reopening of a deportation proceeding is a matter of discretion

The Immigration and Nationality Act contains no specific provisions for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,¹¹ has promulgated regulations which permit reopening or reconsideration of prior decisions as a matter of discretion provided certain criteria are met. The applicable

¹¹ Section 103(a) of the Act, 8 U.S.C. § 1103(a).

regulation, 8 C.F.R. § 3.2, provides in pertinent part that motions to reopen or reconsider "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered at the prior hearing." Additionally, 8 C.F.R. § 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material." See also 8 C.F.R. § 242.22.

Obviously, the regulations contemplate that a motion to reopen or reconsider a prior decision shall contain an offer of evidence, and that the evidence offered shall have been heretofore unobtainable, and that the evidence if accepted would be sufficient to warrant the granting of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. When such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. Therefore, when making his motion to reopen for reconsideration it was incumbent upon Cheng to offer evidence to show not only that he was statutorily eligible for suspension of deportation but that he merited, as a matter of discretion, the extraordinary relief he sought.

B. The record in this case demonstrates that the Board did not abuse its discretion by refusing to reopen petitioner's deportation proceedings.

As discussed previously, the Board refused to reopen Cheng's deportation proceedings because he failed to introduce any evidence demonstrating his eligibility for suspension of deportation other than his achievement of the minimum statutory period of continuous physical

presence. In this appeal Cheng contends that the Board's decision should be reversed because it constitutes an abuse of discretion.

As stated earlier, the scope of judicial review in reviewing an exercise of discretionary authority is extremely narrow. A review of the facts contained in Cheng's motion to reopen, in light of the limited standard of review enunciated in *Wong Wing Hang v. Immigration and Naturalization Service*, *supra*, demonstrates the propriety of the Board's discretionary decision.

1. In the absence of sufficient supporting evidence, the Board's decision refusing to reopen the petitioner's deportation proceedings was proper.

The sole basis for Cheng's motion to reopen his deportation proceedings is the fact that Cheng's son, Tak Luk Chan, entered the United States sometime after his hearing in 1973 and became a lawful permanent resident (AR 10-11). Apparently Cheng was contending, without supporting documents and reason, that he was now eligible for suspension of deportation because his 25 year old son would suffer an extreme hardship if he were deported to Hong Kong (AR 9). This claim is not only unsubstantiated, but contrary to the facts in the record.

When Cheng entered the United States in 1964, he had been serving as a seaman on ships traveling out of Hong Kong since 1951 (AR 106, 57). At that time he had been separated for 13 years from his wife who was still living in Mainland China. Moreover, he claimed that he had no children (*Id.*). From 1965, when he was scheduled to voluntarily depart from the United States (AR 90) until 1975, Cheng had avoided returning to Hong Kong by initiating administrative requests designed to permit his permanent residence in this country and

by evading the Service's authorities. In fact, it was not until he applied for suspension of deportation in 1971 that he first acknowledged having a son, then 19 years old, living in Hong Kong (AR 104). Consequently, it is uncontroverted from the record that Cheng had not seen his son from the time of his entry in 1964 until sometime after 1973. Moreover, since Cheng's work resulted in sustained voyages away from Hong Kong, any relationship with his son between 1952 (approximately when his son was born) and 1964 was tenuous at best.¹²

The intent of Congress in enacting Section 244 of the Act, 8 U.S.C. § 1254 was to remedy the hardship that deportation would create by dividing families that have established "deep roots in our soil". Gordon and Rosenfield, *Immigration Law and Procedure* Section 7.9a at 780.4 (Rev. ed. 1976). The facts in this record fail to demonstrate the existence of any relationship between Cheng and his son; let alone a close family relationship that would be injured by Cheng's deportation. It thus can not fairly be argued that his deportation would result in an "extreme hardship", within the meaning of Section 244 (a), to either himself or his 25 year old son. Consequently, the Board's refusal to reopen his deportation proceedings for reconsideration of its previous denial of this extraordinary discretionary relief was not an abuse of discretion.

¹² In this regard, we note that in Cheng's motion to reopen he did not submit any affidavit or statement from his son attesting to their existing relationship, if any, in the United States or to the "extreme hardship" that his son would face upon his deportation to Hong Kong.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
November 21, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline P. Troia being duly sworn,
deposes and says that s he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the

21st day of November 19 77 she served ² copy^s of the
within govt's brief

by placing the same in a properly postpaid franked envelope
addressed:

Lebenkoff & Coven, Esqs.,
One East 42nd St. NY NY 10017

And deponent further
says s he sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

21st day of November, 19 77

Ralph L. La
Ralph L. La
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1979

Pauline P. Troia